976V02869-450-MO

UNITED STATES DISTRICT COURT	
EASTERN DISTRICT OF NEW YORK	
CLEMENTE JENKINS,	

OOPIES MAILED

OD 11 9 98

MARIA CANDELARIA

Plaintiff.

97 CV 2869 (RJD)

- against -

MEMORANDUM & ORDER

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY,¹

	Defendant.
	X
DEARIE, District Judg	ge.

Pro se plaintiff Clemente Jenkins, born May 15, 1954, completed public high school and received vocational training in cooking. Tr. 38, 128. Over the course of 15 years, plaintiff worked as a hotel cook, a wholesale clothing salesperson, and a city shelter cook. Tr. 38-40. Plaintiff filed an application on January 1, 1993 for disability insurance benefits and supplemental security income benefits, alleging total disability since January 4, 1992 due to injuries to his back, neck, and right knee resulting from a car accident on August 3, 1990. Tr. 41. This application was denied initially and on reconsideration. Tr. 70, 97.

On December 8, 1994, the administrative law judge ("ALJ") held a hearing at which plaintiff appeared with counsel. Tr. 33-55. On August 2, 1995, the ALJ issued a decision that plaintiff was not disabled within the meaning of the Act. Tr. 15-25. The Appeals Council denied

Kenneth S. Apfel was sworn in as Commissioner of Social Security on September 29, 1997. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Kenneth P. Apfel is substituted as the defendant in this suit. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act. 42 U.S.C. § 405(g).

plaintiff's request for review on March 28, 1997. Tr. 3-4. Plaintiff initiated this action <u>pro se</u> on May 20, 1997 pursuant to § 205(g) of the Social Security Act ("the Act").

Medical Evidence

Plaintiff was involved in a car accident, on August 3, 1990, which resulted in injuries to his right knee and a slight puncture of his right kidney. Tr. 41, 42, 141, 150, 192. Plaintiff was treated in the emergency room and released hours later. Tr. 42. Plaintiff began treatment with Dr. Akhtar, on August 10, 1990, for right knee internal derangement. Tr. 151. Plaintiff also received physical therapy for his knee from Dr. Kim during the period of October 11, 1990 through February 28, 1991. Tr. 150. Plaintiff was prescribed Motrin for his pain. Tr. 42. According to Dr. Kim, plaintiff returned to work on October 15, 1990. Id.

Plaintiff was involved in a second automobile accident on March 4, 1991. Tr. 48, 204. Plaintiff complained of headaches, severe neck pain radiating to both shoulders and arms, and moderate back pain. Tr. 204. Plaintiff returned to Dr. Kim for treatment. <u>Id.</u> Dr. Kim's diagnostic impressions were: traumatic cervical and lumbosacral derangement, cervical radiculitis, and post cervical concussion syndrome. <u>Id.</u> Dr. Kim recommended that physical therapy be continued. <u>Id.</u>

Dr. Akhtar requested authorization from the Workers' Compensation Board to perform arthroscopic surgery on plaintiff's right knee in August 1992. Tr. 153. Dr. Akhtar checked the "disabled" box on the Workers' Compensation form. <u>Id.</u> At the same time plaintiff began receiving treatment from Dr. Bajaj. Tr. 157. Dr. Bajaj diagnosed plaintiff as having: cervical radiculpathy, aggravation of cervical radiculpathy, aggravation of right knee derangement, post traumatic dizziness, post concussion syndrome, and post traumatic headaches. <u>Id.</u>

Dr. Akhtar performed arthroscopic surgery on plaintiff's right knee in March 1993. Tr. 44, 139. Following the surgery plaintiff received physiotherapy and was prescribed Motrin. Tr. 200. Plaintiff was involved in a third car accident, on April 21, 1993, in which he injured his back and re-injured his right knee. Tr. 48, 180. Plaintiff was admitted to Long Island College Hospital and was diagnosed with cervical radiculopathy, aggravated cervical radiculopathy, aggravated right knee derangement, and post traumatic dizziness. Tr. 180. Plaintiff was released the same day and was referred to Dr. Bajaj based upon his physical complaints. Tr. 144.

On May 17, 1993, Dr. Bajaj performed a neurological evaluation of plaintiff. Tr. 144-47. Dr. Bajaj found no evidence of an organic mental syndrome. Tr. 145. Plaintiff's memory, concentration, and comprehension appeared intact. <u>Id.</u> Examination of plaintiff's cranial nerve showed no abnormalities. <u>Id.</u> Dr. Bajaj noted that right knee movement was restricted, however, reflexes were equal and symmetrical and plaintiff's gait was normal. <u>Id.</u> Dr. Bajaj diagnosed aggravation of lumbosacral radiculopathy, aggravation of right knee derangement, post traumatic headaches, and post traumatic dizziness. <u>Id.</u> Plaintiff was advised to continue treatments and an EEG was scheduled. Tr. 145. Dr. Bajij signed a disability certificate on June 3, 1993 stating, without elaboration, that plaintiff was "totally incapacitated" since July 31, 1992. Tr. 143.

Dr. Marcheno examined plaintiff at the request of the Commissioner on May 20, 1993.

Tr. 140. A lumbosacral spine x-ray showed mild residual of adolescent spondylosis. <u>Id.</u> A right knee x-ray was normal. Tr. 140, 142. The clinical examination disclosed some tenderness and stiffness in the right knee and atrophy of the left thigh. Tr. 140-41. A neurological exam revealed no sensory, motor, or reflex abnormalities. Tr. 141. Dr. Marcheno determined that plaintiff was capable of performing light physical exertion including lifting and carrying,

standing and walking, and pushing and pulling. Tr. 140. Dr. Marcheno found that plaintiff's tolerance for sitting was moderate. Tr. 145. Dr. Marcheno performed a second examination of plaintiff on March 14, 1994. Tr. 200. An x-ray of plaintiff's right knee disclosed minor arthritic changes. Tr. 201. At this time Dr. Marcheno concluded that plaintiff's impairment for lifting and carrying was moderate. Tr. 202. Plaintiff's impairment for standing and sitting, pushing and pulling, and sitting was mild. Id.

Plaintiff began treatment on August 9, 1993 with Dr. Siegel, a chiropractor, as a result of the injuries sustained in the third car accident. Tr. 156, 187. Plaintiff complained of a headache, neck pain, right shoulder pain and right upper extremity paresthesia, dizziness, low back pain, right knee pain, and chest pain. Tr. 187. Dr. Siegel diagnosed acute traumatic cerebral concussion syndrome with derangement of the spinal column. Tr. 156. Dr. Siegel treated plaintiff with spinal manipulation and noted that plaintiff's response was favorable but guarded. Tr. 188.

Plaintiff sought treatment on November 24, 1993 from Dr. Beaudouin, a staff psychiatrist at Bedford Stuyvesant Community Mental Clinic. Tr. 193-98. Plaintiff complained of depression and feelings of anger. Tr. 193. Dr. Beaudouin diagnosed plaintiff with adjustment disorder with mixed emotional features. Tr. 194. The doctor recommended weekly therapy but did not prescribe medication. <u>Id.</u> According to a report completed by Dr. Beaudouin on February 22, 1994, plaintiff demonstrated no intellectual deficits. Tr. 195.

Plaintiff underwent a neurological evaluation again on December 16, 1993. Tr. 167. The examining physician found "no evidence of neurological injury" but suspected "musculoskeletal injury." <u>Id.</u>

Non-Medical Evidence

Plaintiff completed high school and received vocational training in cooking. Tr. 38, 128.

Plaintiff testified that he no longer drives an automobile due to his physical and mental impairments. Tr. 29. Although plaintiff uses public transportation, he has difficultly managing the stairs. Tr. 38. According to plaintiff, he needs a cane and a brace for his right knee to walk. Tr. 43. Plaintiff's primary daily activity is going to doctor appointments. Tr. 50. Plaintiff stated that he is able to go grocery shopping. Tr. 52. Plaintiff claims that he is not able to sleep for more than two or three hours a night because of his physical and mental impairments. Tr. 54.

Plaintiff received Workers' Compensation as a result of the August 1990 car accident and then sometime in late 1994 started receiving a disability pension from New York City.

DISCUSSION

The Court must determine initially whether plaintiff was accorded "a full hearing under the Secretary's regulations and in accordance with the beneficent purposes of the Act." Robinson v. Secretary of Health and Human Services, 733 F.2d 255, 257 (2d Cir. 1984). Plaintiff was represented by counsel at the hearing. Tr. 34. The ALJ gave plaintiff and his counsel adequate an opportunity to review the relevant documents and allowed plaintiff to submit additional medical records at the hearing. Tr. 34–35. After the ALJ examined plaintiff, plaintiff's counsel was permitted to examine plaintiff and to make closing remarks. Tr. 53-54. The record demonstrates that plaintiff was accorded a full and fair hearing.

In reviewing the Commissioner's finding that plaintiff is not disabled, a district court "may only set aside a determination which is based upon legal error or not supported by substantial evidence." <u>Berry v. Schweiker</u>, 675 F.2d 464, 467 (2d Cir. 1982). Substantial

evidence "is more than a scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." <u>Richardson v. Perales</u>, 402 U.S. 389, 401 (1971). After a review of the record, the Court concludes that the ALJ's decision was not based on legal error and was supported by substantial evidence.

An individual is deemed to be under a disability "only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy" 42 U.S.C. § 1382 (c) (a) (3) (B). The Social Security regulations establish a five-step analysis to be used by the Commissioner when evaluating disability claims.

First, the [Commissioner] considers whether the claimant is currently engaged in substantial gainful activity. If he is not, the [Commissioner] next considers whether the claimant has a "severe impairment" which significantly limits his physical or mental ability to do basic work activities. If the claimant suffers such an impairment, the third inquiry is whether, based solely on medical evidence, the claimant has an impairment which is listed in Appendix 1 of the regulations. If the claimant has such an impairment, the [Commissioner] will consider him disabled Assuming the claimant does not have a listed impairment, the fourth inquiry is whether, despite the claimant's severe impairment, he has the residual functional capacity to perform his past work. Finally, if the claimant is unable to perform his past work, the [Commissioner] then determines whether there is other work that the claimant could perform.

Berry, 675 F.2d at 467 (2d Cir. 1982); see also DeChirico v. Callahan, 134 F.3d 117 (2d Cir. 1998).

The ALJ followed the five-step analysis in his August 2, 1995 decision. First, the ALJ found that plaintiff had not engaged in substantial gainful activity since January 4, 1992 and that plaintiff met the disability insured status requirements of Title II of the Act on January 4, 1992

through March 31, 1994. Tr. 17. The ALJ then concluded, based upon the medical evidence submitted by plaintiff's treating physicians, that plaintiff has "a combination of physical impairments, including cervical radiculopathy and is status-post right knee internal derangement and arthroscopic examination, which would be severe in that they could reasonably be expected to significantly limit the claimant's ability to perform the basic work activities of such physical functions as walking, standing, lifting, pushing, pulling and carrying, as described in 20 CFR 404.1521(b) and 416.921(b)." Tr. 20. The ALJ also concluded, however, that plaintiff's "mental impairment was 'not severe' in that the [plaintiff's] own treating sources indicate that the [plaintiff's] adjustment disorder is no more than a slight abnormality which would have no more than a minimal effect of [sic] the claimant's mental abilities to perform the basic work activities required in most jobs." Tr. 20-21.

Although the medical evidence suggested that plaintiff's physical impairments may be severe, those impairments were not listed in, or medically equal to one listed in Appendix 1, Subpart P." Tr. 21. The ALJ therefore proceeded through the analysis to determine whether despite the plaintiff's physical impairments, he had residual functional capacity to perform his past work. Based upon the medical evidence presented, the ALJ properly concluded that the plaintiff was unable to perform his past work "as a kitchen supervisor which required that he lift heavy weights sometimes up to 50 pounds." Tr. 23.

Since the ALJ determined plaintiff was unable to perform his past work the burden shifted to the Commissioner to demonstrate that plaintiff's residual functional capacity, in combination with his age, education, and past work experience, does not preclude him from performing other gainful activity. 20 C.F.R. §§ 404.1520, 416.920. The Commissioner may ordinarily satisfy this

burden by relying on the medical vocational guidelines. <u>Bapp v. Bowen</u>, 802 F.2d 601, 604 (2d Cir. 1986) <u>citing</u> 20 C.F.R. Pt. 404, Subpt. P, App. 2 (1986). When the claimant suffers from non-exertional impairments in addition to physical impairments, however, the grid rules may not control. <u>Id.</u> The ALJ must determine whether the claimant's non-exertional impairments "significantly limit the range of work permitted by his exertional limitations." <u>Id.</u> at 605. When the claimant's work capacity is significantly diminished by non-exertional impairments, the government must produce a vocational expert to demonstrate the availability of jobs in the national economy available for an individual with claimants physical and non-physical limitations. Id. at 606-7.

The ALJ considered plaintiff's physical limitations imposed by his severe and non-severe impairments and concluded that plaintiff did retain "the capacities to maximally lift and carry up to ten pounds, to occasionally . . . stand and/or walk (with normal breaks) for a total of at least two hours in an eight-hour workday; to sit, and to occasionally stoop . . . and to use his arms and hands to reach for and handle objects." Tr. 23.

The ALJ also considered plaintiff's non-exertional impairment, and concluded that plaintiff retained the capacity to understand and remember simple instructions, to sustain concentration and persistence to carry out simple instructions, and to interact appropriately with supervisors and co-workers in a work setting. <u>Id.</u> The ALJ stated that "the claimant's non-severe mental impairment [does] not prevent him from performing the basic mental demands of competitive, remunerative, unskilled work as defined at 20 CFR 404.1548(a) and 416.967(a). <u>Id.</u> The ALJ concluded that plaintiff, according to the Grids could "reasonably be expected to make a vocational adjustment to the approximately 200 separate unskilled sedentary occupations . . .

administratively noticed in Section 201.00 of Appendix. 2." Id.

The ALJ is required to give treating physicians' opinions special consideration when determining the extent of a claimant's disability. Clark v. Commissioner of Soc. Sec., 143 F.3d 115, 118 (2d Cir. 1998). Generally, opinions of treating physicians that are "well supported by medically acceptable clinical and laboratory diagnostic techniques and [are] not inconsistent with the other substantial evidence," are given "controlling weight." 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(12). If a treating source's opinion is not given controlling weight, the ALJ must include "good reasons" for discounting the opinion. Id. The ALJ must consider the following factors in evaluating the treating source's opinion: (1) the length of the treatment relationship and the frequency of examination, (2) the nature and extent of the treatment relationship, (3) the evidence offered to support the opinion, (4) the consistency of the opinion with the entire record, and (5) the specialty of the source offering the opinion. Id.; see also Schaal v. Apfel, 134 F.3d 496, 504 (2d Cir. 1998) (finding ALJ is required to consider all factors listed in Regulations and document reasons for discounting treating source's opinion).

According to reports dated August 10, 1992 through September 12, 1993 and filed by Dr. Akhtar, with the New York State Workers' Compensation Board, plaintiff was totally disabled due to status-post right knee internal derangement with post-arthroscopic examination. Tr. 151-53. While a determination for another governmental agency that the claimant is totally disabled is not binding on the Commissioner, it is entitled "to some weight and should be considered."

Cutler v. Weinberger, 516 F.2d 1282, 1286 (2d Cir. 1975). Dr. Akhtar performed the arthroscopic surgery and treated plaintiff from August 1990 through at least September 1993. Dr. Akhtar's reports did not include details of plaintiff's physical condition. The reports, both before and after

the surgery, merely stated that plaintiff was totally disabled. Plaintiff received Workers'

Compensation until late 1994, therefore it is not clear whether the doctor's description of "totally disabled" meant that plaintiff was merely not able to go back to his past work as a cook or that plaintiff was unable to perform any other job in the national economy.

Dr. Bajaj, another treating physician stated on June 3, 1993, that plaintiff was totally incapacitated and under his care. Tr. 143. During the pendency of plaintiff's claim for benefits, Dr. Bajaj submitted, to the Commissioner, two evaluations describing plaintiff's functional capacity. On December 10, 1993, Dr. Bajaj stated that plaintiff was capable of: (1) lifting and carrying up to nine pounds, (2) standing and/or walking up to two hours per day, (3) sitting up to six hours a day, and (4) limited pushing and/or pulling. Tr. 161. Dr. Bajaj found plaintiff had no postural, manipulative, visual, communicative, or environmental limitations. Id. On October 14, 1995, Dr. Bajaj submitted an evaluation stating that plaintiff could sit, stand or walk for two hours a day in 15 minute intervals, occasionally lift up to ten pounds, occasionally carry up to ten pounds. Tr. 216. Dr. Bajaj stated that plaintiff could not use his hands for repetitive pushing and pulling or for fine manipulation. Id. Dr. Bajaj totally restricted plaintiff from activities involving unprotected heights, moving machinery, and driving automatic equipment. Id. Under the Regulations, sedentary work requires that a person be able to sit for approximately six hours in an eight hour day, stand and/or walk for two hours in an eight hour day, and involves lifting of no more than ten pounds at a time. 20 C.F.R. § 404.1567(a). Since Dr. Bajij found that plaintiff was only able to sit for two hours in an eight hour day, his second report would indicate that plaintiff was incapable of performing sedentary work.

The ALJ addressed Dr. Bajaj's findings and concluded that they were not supported by

"objective medical evidence." Tr. 21. The ALJ relied on x-rays of plaintiff's left shoulder which "revealed no evidence of acute fracture or dislocation" and the results of an MRI of the cervical spine which were negative. Id. The ALJ also discounted Dr. Bajij's statement that plaintiff needed a cane to walk based upon the fact that plaintiff was observed in March 1994, by Dr. Marcheno, "to be able to walk with a stable gait and [did] not need a cane." Tr. 22. The ALJ found that Dr. Bajij's statement that plaintiff was unable to stand for more than two hours a day was not supported by an x-ray of plaintiff's right knee which disclosed only "minor osteoarthritic changes." Id. Similarly, the ALJ, relying on radiogrpahical studies which suggested mild residual spondylosis, concluded that plaintiff's ability to sitting was only mildly limited. Id.

On November 15, 1993, Dr. Seigel, a chiropractor, stated in a letter addressed to "whom it may concern" that plaintiff was unable "to perform his regular duties until further notice." Tr. 156. Dr. Siegel found that plaintiff needed a right knee brace and cane to walk. Tr. 191. Plaintiff's ability to lift and carry was limited to 10 pounds. Id. Plaintiff's ability to stand or walk was limited to less than two hours per day. Id. Plaintiff's ability to sit was limited to less than six hours a day and plaintiff's ability to push and/or pull was limited due to right shoulder pain and upper extremity parathesia. Id. On November 15, 1993, Dr. Siegel opined that plaintiff was unable to "perform his regular work duties until further notice." Tr. 156. Plaintiff also submitted a report from his physical therapist, Mr. Osder. Tr. 186. Mr. Osder stated that plaintiff was able to lift and carry up to fifteen pounds, stand and walk for up to two hours, sit up to six hours and had limited ability to push and pull. Id. Mr. Osder opined in the report submitted to the Commissioner that plaintiff was "totally disabled." Id.

The Commissioner is not required to give controlling weight to a chiropractor's or a

physical therapist's opinion that a claimant is totally disabled. <u>Diaz v. Shalala</u>, 59 F.3d 307, 313 (2d Cir. 1995). Chiropractors' and physical therapists' opinions are not "medical opinions" as defined by the Regulations. <u>Id. citing C.F.R.</u> § 404.1527(a)(2). The ALJ has discretion to determine the amount of weight to accord these opinions. <u>Id.</u> at 314. Again, it is not clear from Dr. Seigel's report whether he was stating that plaintiff could not return to his previous work as a cook or that plaintiff was incapable of performing any type of gainful activity. The findings of Mr. Osder were similar to those of Dr. Bajaj. As discussed above, the ALJ found that these findings were not supported by the medical evidence.

The ALJ also considered plaintiff's subjective complaints of pain and functional limitations. Tr. 22. "[D]isability requires more than mere inability to work without pain. To be disabling, pain must be so severe, by itself or in conjunction with other impairments, as to preclude any substantial gainful employment." <u>Dumas v. Schweiker</u>, 712 F.2d 1545, 1552 (2d Cir.1983). The ALJ concluded that while the plaintiff "does have physical impairments which might reasonably produce <u>some</u> pain and limitations, [he was] not persuaded that such pain and limitations are <u>disabling</u>" within the meaning of the Act. Tr. 22. The ALJ found that plaintiff's physical complaints to be "out of proportion" and inconsistent with the objective medical evidence presented at the hearing. Tr. 22-23. The credibility of the plaintiff's testimony is a matter within the province of the Commissioner. <u>Dumas v. Schweiker</u>, 712 F.2d 1545, 1552 (2d Cir. 1983).

As shown above, the ALJ adequately described the grounds for his decision to give more weight to the consultative physician that to plaintiff's treating physicians. The ALJ properly concluded that the plaintiff is capable of performing sedentary work.

For the foregoing reasons, the Commissioner's motion on the pleadings is granted and the action is dismissed.

The Clerk of the Court is directed to close this case.

SO ORDERED.

Dated:

Brooklyn, New York November 5, 1998

RAYMOND J. DEARIE
United States District Judge